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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1974
No. 74-208

GREAT LAKES STEEL DIVISION, NATIONAL STEEL CORPORATION; ALLIED CHEMICAL CORPORATION; THE DETROIT EDISON COMPANY,

Petitioners,

vs

JAMES MICHIE *et al.*

Respondents.

RESPONDENTS' STATEMENT OF THE CASE

Although there may be a large number of "stationary sources," (i.e. industrial polluters) in the Detroit metropolitan area, many of them are too remote from respondents' properties to be defendants here. Respondents have joined as defendants the three companies which operate between them about 7 plants located at the river's edge. These plants are among the largest sources of effluent in the Detroit area, and are the largest in close proximity to plaintiffs. Emissions can be visually observed coming from these plants, crossing the river, and to plaintiffs' homes.

Plaintiff-respondents' theory and claim is that these defendants emissions into the air occur concurrently, that they mix together in the air, that the mixing synergistically increases the effect of the emissions, and that the mixed pollutants cause a nuisance which damages plaintiffs. Plaintiffs claim that the mixture causes an indivisible injury for which those who contribute to the mix are jointly liable.

I.

THE DECISION BELOW IS A CORRECT AND PROPER APPLICATION OF MICHIGAN LAW.

Even though the Michigan appellate courts have not specifically confronted a case where the question of whether many

defendants whose acts create a nuisance inflicting an indivisible injury on plaintiffs may be treated as joint tortfeasors. Michigan law on this question is quite easily found. A state is not without law excepting as its highest courts have declared it, and it is the task of the Federal court here to determine what that law is. *West* v *American Telephone & Telegraph Co.*, 311 U.S. 223, 61 S. Ct. 817, 85 L. Ed. 139.

> . . . where direct expression by an authorized state tribunal is lacking, it is the duty of the federal court, in dealing with matters of either common law or statute, to have regard for any persuasive data that is available, such as compelling inferences or logical implications from other related adjudications and considered pronouncements. The responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it. Any convincing manifestation of local law, having a clear root in judicial conscience and responsibility, whether resting in direct expression or obvious implication and inference, should accordingly be given appropriate heed.

Yoder v. *Nu-Enamel*, 117 F.2d 488, 489 (8th Cir. 1941).

The Seventh Circuit adopted the same test in *Hartzler* v. *Chesapeake and Ohio Railway Co.*, 433 F.2d 104 (7th Cir. 1970).

In Michigan there is "convincing manifestation of local law," and it has its root in the judicial conscience and responsibility of Hon. Talbot Smith, (now Senior Judge of the United States District Court for the Eastern District of Michigan) who wrote for the Michigan Supreme Court in *Maddux* v *Donaldson*, 362 Mich 425, 108 N.W. 2d 33 (1961), at page 430,

> When we impose upon an injured plaintiff the necessity of proving which impact did which harm in a chain collision situation, what we are actually expressing is a judicial policy that it is better that a plaintiff, injured through no fault of his own, take nothing, than that a tort-feasor pay more than his theoretical share of the damages accruing out of a confused situation which his wrong has helped to create. The mere statement of the policy exposes its aberrations.

In support of this he cited *Landers* v *East Texas Salt Water Disposal Company*, 151 Tex 251, 248 S.W. 2d 731 (1952), a case in which two industries which both polluted a stream were held jointly liable for the indivisible injuries to a downstream plaintiff.

In the *Maddux* case, although it was an auto negligence case, the court adopted the rule pronounced in the *Landers* pollution case. Throughout the *Maddux* opinion reference is repeatedly made to "tort-feasors," not just "negligence-feasors." The Michigan court took a rule applied in ancient cases to intentional tort and confusion-of-goods cases and applied it to all tortfeasors.

The persuasive and logical opinion ends with the expression,

> We percieve no reason why . . . tort-feasors should escape liability because of the very complexity of the injury created by their wrong.
>
> *Maddux, supra* at 436

In this case there is a complex situation. There is a confusion of pollutants being wafted across the Detroit River. The effluents which petitioners put in the air become confused together, helping to create the indivisible harm complained of. The obvious implication is that the Michigan court, faced with this case would apply the *Maddux* rule. Therefore so must also the federal court. The Michigan court did more than pronounce a procedural rule for auto negligence cases. It directly expressed a pervading judicial philosophy that wrongdoers should bear the risk of overpayment rather than the injured party bear the impossible burden of apportioning an indivisible injury; and this can be best accomplished by treating the wrongdoers as joint tortfeasors.

Petitioners contend that the *Maddux* rule applies to cases involving the tort of negligence but not the tort of nuisance. The cite no authority for this limitation. In Michigan, negligent conduct may be involved in the creation of a nuisance but it is not essential to liability.

> Primarily, nuisance is a condition. Liability is not predicated on tortious conduct through action or inaction on the part of those responsible. Nuisance may result from want of due care . . . but may still exist as a dangerous, offensive, or hazardous

condition even with the best of care.

Buckeye Insurance Co. v *State*, 383 Mich 630, 636, 170 N.W. 2d 476 (1970)

By their reasoning, if plaintiffs had pleaded that the defendants were guilty of want of due care under the circumstances, – for example by venting their emissions into an atmosphere which they knew or should have known to be dangerously overloaded, – then they could have no objection to being fictional joint tortfeasors. But their conduct remains the same, though pleaded in nuisance.

To declare that concurrent nuisance-feasors and concurrent negligence-feasors would be treated disparatly in Michigan is to attribute judicial aberrations to Michigan law. The federal courts can never presume that state law is absurd, in the absence of direct, compelling and unequivocal holdings so.

III

PETITIONERS ARE NOT DENIED FUNDAMENTAL DUE PROCESS OF LAW BY THE DECISION BELOW

Petitioners allege that because they are being treated as if they are joint tortfeasors here that they are denied fundamental due process. Their reasoning is that there are other polluters like themselves whose effluent contributes to the damages complained of, and who could also have been sued as joint tortfeasors if petitioners themselves are. Then they say that because Michigan law denies them the right to obtain contribution from such other polluters, they may have to bear the full responsibility, i.e. more than their fair share of the damages to be assessed. This they say deprives them of property without due process of law.

They would suffer no such deprivation however if Michigan law allows them a remedy for contribution against any other such emitter, which it does.

The Michigan Contribution Betweeen Joint Tortfeasors Act (M.S.A. sec. 27A. 2925) is set forth in the petition. It provides for contribution among joint tortfeasors but does not define who such persons might be. Petitioners' position is that the Court of Appeals

merely makes them jointly liable *as if* they were joint tortfeasors whereas they are not *real* joint tortfeasors, and the statute applies only to real joint tortfeasors. There are two fallacies in this.

First, *Maddox* v *Donaldson, supra* pg. 2, does not say that Michigan law will *pretend* that these defendants are joint tortfeasors, it says they *are* so.

Second, the problem in *Moyses* v *Spartan Asphalt Paving Co.*, 383 Mich 314, 174 N.W. 2d 797 (1970), relied upon by petitioners is somewhat different. In *Moyses* the plaintiff sued the defendant for negligent operation of a vehicle. Defendant sought to bring in the manufacturer and seller of a tire on its vehicle as third party defendants for contribution under the statute, on a products liability theory claiming that the crash was proximatly caused by a defective tire. The *Moyses* court said that the contribution statute did not apply because defendant *Spartan* and the tire people were tortfeasors whose liabilities to the plaintiff arose out of variant legal positions concurrently applied. But with respect to

> . . . those who may – under present rules of court – be joined as defendants, *by the plaintiff* . . ., and held responsible to him for damages sustained on account of their causally cooperating but non-joint acts or omissions . . .
>
> *Moyses, supra* 331

the Michigan Supreme Court deferred to its Court of Appeals decision in *Duncan* v *Beres*, 15 Mich App 318, 166 N.W. 2d 678 (1968).

In the *Duncan* case Judge Levin (now a Justice of the Michigan Supreme Court) declared that in a dramshop case the contribution statute applies as between bar owners who violate the dramshop act by selling liquor to an intoxicated person. He pointed out that the taverns were under a common burden of liability based upon violation of the same statutory duty, although at different places and serially in time. The court held that contribution applied to tavern owners because their liability does not depend on intentional wrongdoing or negligence, and arises without regard to the care they exercise to avoid it.

Again, in Michigan nuisance liability does not depend on intent or negligence and can arise from a condition which exists, see *Buckeye Ins. Co* v *State, supra*, pg 4). Also, the duty owed by these petitioners to the respondents was and is the same: to refrain from nuisance-creating activities. Michigan law would permit contribution among such persons whose concurrent emissions proximitly caused plaintiffs' harm.

A right to contribution exists only if there is a joint judgement, *In re: Lady D.*, 416 F. 2d 454 (6th Cir. 1969) under Michigan law. The Court of Appeals below did not enter a joint judgement. It shifted the burden of proof of divisibility of injuries from plaintiffs to defendants. If petitioners produce proofs from which the trier of fact can apportion the damages, then they may be apportioned. In that event there will be no contribution problem, each shall have been assessed its proper share. The issue is at this time premature. This court should no decide constitutional issues in advance of the necessity for doing so. *Asbury Hospital* v *Cass County*, 326 US 207, 66 S. Ct. 61, 90 L. Ed. 6 and *Clay* v *Sun Insurance Co. Ltd.*, 363 U.S. 207, 80 S. Ct. 1222, 4 L. Ed. 2d 1170.

There is no authority to support the proposition that failure of state law to provide a contribution remedy for one wrongdoer who helped cause harm is an unconstitutional deprivation of property without due process.

CONCLUSION

Judge Edwards, who wrote the decision below, was once a Justice of the Michigan Supreme Court. He participated in that court's decision in the *Maddux* case, (see 495 F. 2d at 217, pg. 44a of petitioners' appendix). The Court of Appeals has not decided an important state question in a way in conflict with applicable state law, nor have any other special and important reasons for review on certiorari been shown. The writ should be denied.

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